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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 247

OHIO TURNPIKE COMMISSION,

Petitioner,

v.

S. J. GROVES & SONS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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S. J. GROVES & SONS COMPANY,

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on April 3, 1963.

OPINIONS BELOW.

The memorandum opinion of the United States District Court for the Northern District of Ohio, Western Division, by Judge Kloeb (R. 31a) is unreported and is printed as Appendix A hereto, *infra*, p. 25. The opinion of the United States Court of Appeals for the Sixth Circuit, printed as Appendix B hereto, *infra*, p. 27, is reported in 315 F. 2d 235 (1963).

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit, printed as Appendix C hereto, *infra*, p. 33, was entered on April 3, 1963 (R. 2c). The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. In view of the plain language of Rule 56 of the Federal Rules of Civil Procedure, can a federal court of appeals refuse to review the record before the district court and set aside a summary judgment granted by the district court because the case appears complex, the record voluminous, or the work of review too burdensome to undertake?

2. Can a federal court of appeals amend Rule 56 of the Federal Rules of Civil Procedure by adding requirements contrary to the express provisions of such rule as a condition for the granting of summary judgment?

3. Where the district court **has specifically found** that the total record shows that there is no genuine issue as to any material fact **and has further found** that the unambiguous written contract of the parties, together with other record documents, when applied to the contentions of respondent entitles petitioner to judgment as a matter of law, can the court of appeals set aside the judgment of the district court **without reviewing the record** to determine whether the findings made by the district judge were correct or incorrect, saying:

> "* * * There are no findings of fact by the District Judge, since none are required or considered necessary by Rule 52(a), Rules of Civil Procedure, in summary judgment proceedings. Yet we find our-

selves unable to satisfactorily review this judgment on the record before us without such findings."?

4. Is the judgment of the district court correct?

5. Is a litigant who is precluded by the plain language of an unambiguous written contract from the recovery which he seeks entitled to pre-empt the attention of judicial tribunals, burden opposing litigants and impair the administration of justice by advancing contentions patently inconsistent with said contract and presenting evidence of extraneous matters which cannot alter the rights of the parties?

STATUTE AND RULE INVOLVED.

The statutory provision challenged by the decision of the court of appeals is the Authorization Act of the Federal Rules of Civil Procedure, 28 U. S. C. § 2072, which is printed as Appendix E hereto, *infra*, p. 36, and states in part:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.
>
> * * * * *
>
> "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. * * *"

Directly violated is Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A., which is printed as Appendix F hereto, *infra*, p. 37, and provides in part in subdivisions (b) and (c) thereof:

> "* * * A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or with-

out supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"* * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *"

STATEMENT.

This petition seeks a review of a decision of the United States Court of Appeals for the Sixth Circuit which usurps the rule-making power of the Supreme Court and emasculates Rule 56 of the Federal Rules of Civil Procedure by adding conditions which are directly contrary to the provisions thereof. If permitted to stand, this decision will not only deprive this petitioner and other litigants of judgments to which they are clearly entitled under Rule 56 but will also encumber already overburdened district courts with unnecessary trials (R. 1b, 3c-7c).

In this case the district court applied the terms of an unambiguous contract to a program of work admittedly performed. Under the terms of that contract respondent had agreed to build a portion of the Ohio Turnpike, which extends across northern Ohio from Pennsylvania to the Indiana line. Petitioner let contracts for construction on a competitive basis (R. 36a). Bids on soils items were on a unit price basis, with quantities listed by petitioner expressly for the limited purposes of comparison of bids and computation of the amounts of bonds required of the contractor (R. 42a).

After 38 unsuccessful bids on other sections of the Turnpike and drastic reduction of its unit prices, respondent was awarded the contract in suit (R. 36a, 14b-15b).

During construction respondent encountered problems relating to subsurface conditions which resulted in its handling greater quantities of earth materials than it had anticipated. The written contract of the parties had contemplated the very conditions which were encountered and had expressly provided that all work performed was to be paid for at the unit prices bid. The contract further provided for the rejection of unsuitable material and established the time and conditions for payment of a retained percentage (R. 36a-54a, 2b-13b).

Thereafter, contrary to and in direct violation of the express terms of the admittedly unambiguous contract between the parties, respondent filed its action against petitioner in the United States District Court for the Northern District of Ohio, Western Division, on June 4, 1957, seeking in excess of one and a half million dollars plus interest and costs (R. 36a-54a, 2b-13b, 45b-48b, 1a, 3a-11a). Federal jurisdiction in the district court was based upon diversity of citizenship between respondent and petitioner (R. 3a). Discovery procedures were pursued by the parties in the district court. Depositions, stipulations, admissions and documentary exhibits were filed. Having previously answered, petitioner filed a motion for summary judgment. Affidavits supporting and opposing the motion, and embracing documentary exhibits, were filed.

After briefing and oral argument the district court considered all of the materials on file and found that those materials showed that there was no genuine issue as to any material fact required to determine the liability of petitioner and that petitioner was entitled to judgment as a matter of law. Final judgment was rendered in favor of petitioner (R. 1a-2a, 34a-35a), the court saying in part in its memorandum (Appendix A hereto, *infra*, pp. 25-26):

"From a study of the grounds of complaint, the contract, and the documents constituting a part of the contract, the stipulation, depositions and deposition exhibits, and the affidavits in support of the motion, and the affidavit in opposition thereto, including the exhibits to the affidavits, the Court concludes that the motion ought to be and is sustained.

"The contract on its face precludes plaintiff from recovery. Plaintiff appears to have foreclosed itself from recovery under Counts 2 and 3 of the complaint by the conditions in the contract to which it subscribed. In addition thereto, plaintiff accepted payment on twenty-four separate occasions on the terms offered and thereby compromised and settled its claims. It is, therefore, estopped by acceptance of these payments.

"The contract is not ambiguous in any respect and plaintiff claims no ambiguity.

"Plaintiff was one of many bidders for the three sections of the Turnpike proposed to be constructed and was successful in its unit price bid. To permit plaintiff to recover for the extras sought under Counts 2 and 3 would require the Court to reframe the contract or enact a wholly new one, diverging completely from the unit price basis and awarding to plaintiff sums more than double the unit price bid. This we feel we cannot do.

"We conclude that defendant has no liability to plaintiff at this time under Count 1 of the complaint for failure or refusal of plaintiff to comply with the provisions of the contract."

The judgment of the district court is printed as Appendix D hereto, *infra*, p. 34.

Upon appeal by respondent the court of appeals set aside the judgment of the district court and remanded the case to the district court for further proceedings consistent with the views of the court of appeals (R. 2c, 5c-

7c; Appendixes B and C hereto, *infra*, pp. 27-32, 33). The court of appeals did not hold that the pleadings, depositions and admissions on file, together with the affidavits, failed to show either (1) that there was no genuine issue as to any material fact, or (2) that petitioner was entitled to a judgment as a matter of law. Rather, the court of appeals proceeded to add five new conditions to Rule 56 which in effect amounted to a complete amendment thereof. These new amendments would: (1) Delete the mandatory requirements of the rule; (2) eliminate from the rule any case which is not simple, or which involves complex facts and issues, or which requires the consideration of a bulky and voluminous record; (3) add as a ground for denying application of the rule the disagreement of the parties on inferences to be drawn from the facts; (4) add as a ground for setting aside a summary judgment entered by a district court the absence of findings of fact and conclusions of law, which are admittedly not required; and (5) add the contentions of the parties as constituting direct factual issues. The attempted amendments are indicated in the following portion of the court of appeals decision and are discussed in detail *infra*:

> "This Court has on several occasions expressed the view that a trial judge should be slow in disposing of a case of **any complexity** on a motion for summary judgment, that while such a judgment wisely used is a praiseworthy and timesaving device, yet such prompt dispatch of judicial business is neither the sole nor the primary purpose for which courts have been established, and that a party should not be deprived of an adequate opportunity to fully develop his case by witnesses and a trial, when the issues involved make such procedure the appropriate one. * * *
>
> "It is often the case that **although the basic facts are not in dispute, the parties in good faith may**

nevertheless disagree about the inferences to be drawn from these facts, what the intention of the parties was as shown by the facts, or whether an estoppel or a waiver of certain rights admitted to exist should be drawn from such facts. **Under such circumstances the case is not one to be decided by the Trial Judge on a motion for summary judgment.** * * * These principles are, in our opinion, applicable to the present case.

"This case is **not a simple one.** It involves **complex facts and issues.** It was filed June 4, 1957. It has been strenuously contested. Motion for summary judgment was not made until March 20, 1961. The motion was not sustained until March 30, 1962. In the oral argument before this Court on the merits the maximum time allowance was used by both parties. **It is stated in appellant's reply brief that appellant's appendix of 121 printed pages and appellee's appendix of 49 printed pages set forth affidavits and excerpts from more than 1800 pages of contract documents, plans, specifications, correspondence, reports, depositions, admissions and the like.** More than the construction of the written contract is involved. The issues of defendant's breach of an implied warranty, estoppel, and accord and satisfaction must be considered in the light of the actions of the parties. **It seems that a direct factual issue is presented by the defendant's contention** that the concrete aggregates stockpiled by the plaintiff and rejected by the defendant did not meet the specifications of the contract. **There are no findings of fact by the District Judge, since none are required or considered necessary by Rule 52(a), Rules of Civil Procedure, in summary judgment proceedings. Yet we find ourselves unable to satisfactorily review this judgment on the record before us, without such findings.**

"We are of the opinion that this case is one where a full inquiry into the facts under usual trial procedure is advisable to develop the facts for the pur-

pose of clarifying the application of the law, and that it is not a case suitable for disposition through summary judgment procedure. * * *" (Emphasis added. R. 5c-7c; App. B; *infra*, pp. 29-31.)

It is this usurpation of the power to amend Rule 56 which creates the urgent necessity for this Court to review this matter.

REASONS FOR ALLOWANCE OF THE WRIT.

The aforementioned approach of the court of appeals in regard to Rule 56 gives rise to several persuasive factors, independent and interlocking, which demonstrate the desirability of the allowance of the writ here sought by petitioner. These factors will be discussed in the subsections of this petition which follow.

1. The court of appeals decision amounts to amending Rule 56 of the Federal Rules of Civil Procedure, and there should be no such amendment without the consideration and determination of this Court.

The language of Rule 56(c) of the Federal Rules of Civil Procedure, 28 U. S. C. (Appendix F, *infra*, p. 37), is clear and unqualified:

> "* * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *"

It will be noted that the rule is very specific in requiring that a judgment "**shall be rendered**" if the designated portion of the record shows that (1) "**there is no genuine issue as to any material fact**" and (2) "**the mov-**

ing party is entitled to a judgment as a matter of law" (emphasis added). This Court in promulgating the rule used mandatory language. It is not a matter of discretion or option with either the district court or the court of appeals. The decision here challenged is inconsistent with the mandatory nature of this rule.

The court of appeals decision in effect first attempts to amend the rule by deleting the words "shall be rendered." It will be noted that the court did not hold that Judge Kloeb erroneously found that there was no genuine issue as to any material fact. Neither did it hold that Judge Kloeb erroneously found that petitioner was "entitled to a judgment as a matter of law." It held that without findings of fact (which admittedly the rule does not require) the court was "unable to satisfactorily review this judgment." This completely amends the rule. It removes the necessity for reviewing the record and for determining whether there are or are not genuine issues as to any material fact and for determining whether the moving party is or is not entitled to a judgment as a matter of law.

The second amendment resulting from the decision of the court of appeals deletes that portion of the rule which specifically requires the court to review the "pleadings, depositions, and admissions on file, together with the affidavits." The opinion in question states, "This case is not a simple one." It then recites the existence of pleadings, depositions and admissions as demonstrating that the case is not simple. The fact that the rule as promulgated by this Court specifically contemplates the use of summary judgment in a case where there are "depositions," "admissions" and "affidavits" is entirely inconsistent with the use by the court of appeals of the mere existence of same as a reason for eliminating a case from the rule. In addition to

this inconsistency the further result is the amendment of the rule by the insertion of the requirement "in a simple case" as a prefix to that portion which reads "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show." This amendment leaves many questions unanswered, for example: What is "a simple case"? If a total of 170 printed pages of appendixes are too many to be reviewed, what is the maximum number permitted under Rule 56? How many pages of depositions may be taken? What portion of its allotted time for oral argument may a party use without forfeiting its right to summary judgment? How many pages may a contract have before it becomes "complex"? The contract, whether it contains 1 or 500 pages, is still the integration of the agreement of the parties and must be read and applied by the court. When, as here, there is no dispute as to what was actually done by the parties, and the contract which resolves and denies the claims of respondent is not ambiguous, the case is not complex and summary judgment is mandatory. A decision holding otherwise not only amends, in effect it destroys, Rule 56.

The third amendment which results from the decision is that the rule does not apply if "the parties in good faith may nevertheless disagree about the inferences to be drawn from these facts." No such limitation appears in the rule. It relates only to a "genuine issue as to any material fact." If the Supreme Court intends that the district court must also find that there is no dispute as to inferences to be drawn from the facts, then in all fairness this should specifically be included in the rule. However, it is difficult even to imagine a case where there was not a dispute as to inferences to be drawn from the facts, and such a provision would for all practical purposes eliminate the rule. The proper application of the rule is demonstrated

by the action of the district court in applying an unambiguous written contract to undisputed facts and finding that the inferences for which respondent contended were not justified.

The fourth change engrafted onto the rule by the court of appeals is that the absence of findings of fact justifies a reversal of a summary judgment even though it is not questioned that such findings are not "required or considered necessary by Rule 52(a)." Such a requirement creates a senseless dilemma for the district court: on the one hand a case cannot be reviewed without findings of fact, and on the other no such findings "are required or considered necessary."

A fifth amendment is that a "direct factual issue" is presented by a party's "contention." Thus, the court of appeals stated, "It seems that a direct factual issue is presented by the defendant's contention that the concrete aggregates stockpiled by the plaintiff and rejected by the defendant did not meet the specifications of the contract." (Appendix B hereto, *infra*, p. 31.) Whether or not the aggregates met contract specifications is not a material issue; the contract specifically delegated the final decision on acceptability of materials to petitioner's engineer (R. 3b). The district court properly concluded that this provision on its face precluded recovery for the aggregates (Appendix A hereto, *infra*, p. 26). In any event, regardless of whether the contentions pertain to material or immaterial issues, the rule says nothing about conflicting contentions of the parties. It is inherent in the very nature of lawsuits about contracts that the parties would make conflicting contentions as to the significance of the facts and the meaning of the contract when applied thereto. However, under the rule as written the court analyzes these conflicting contentions in the light of the pleadings,

depositions, admissions and affidavits to determine whether there is an issue as to any material fact. In the case at bar, Judge Kloeb considered the parties' contentions as to the aggregates but determined that the undisputed fact was that by the contract the respondent had agreed to be bound by the decision of the engineer of the petitioner and that such engineer had made the decision adversely to respondent's contentions. The district court held from the facts, which were not in dispute, that the contentions in regard to the aggregates were immaterial and that petitioner was entitled to judgment as a matter of law on this claim. This determination by Judge Kloeb was directly required by the language of the rule.

If one views the situation of a litigant or of a district court in the sixth circuit who seeks to follow Rule 56, it is quite apparent that there is urgent need that this matter be cleared up by the Supreme Court, in whom the rule-making power is vested. Rule 56 is an important and valuable tool in enabling our federal courts to expedite judicial business. It saves both the courts and the parties time and money. The decision appealed from in this case results in the rule becoming so seriously restricted, and the meaning of the rule so obscured by "judicial amendments," that it is not only unjust as to the petitioner in this case but the rule itself is rendered of little value.

The summary judgment rule was prescribed by this Court for use throughout the federal court system. There is an established statutory and judicial procedure for amending the rule (Appendix E, *infra*, p. 36) which has not been used to impose the conditions added by the court of appeals in this case. If any such limitations are to be written into Rule 56, certainly they merit the consideration and determination of this Court.

2. The decision of the court of appeals goes beyond and is at odds with prior determinations of this Court.

After its promulgation of Rule 56 of the Federal Rules of Civil Procedure, this Court has from time to time accepted and reviewed on the merits cases where summary judgment was granted by the court below. Without limitation as to type of action or volume of factual materials displaying the requisites of Rule 56, such decisions have been affirmed.

Thus, for example, the case of *Northern Pac. Ry. Co. v. United States*, 356 U. S. 1 (1957), involved many agreements incorporated in deeds and leases to several million acres of land. There were "voluminous pleadings, stipulations, depositions and answers to interrogatories filed in the case," (p. 4) and considered in connection with the motion for summary judgment. This Court held, "In this case we believe the district judge was clearly correct in entering summary judgment * * *" (p. 7).

Another case in which a complex record was considered by the district court in rendering a summary judgment was *United States v. Krasnov*, 143 F. Supp. 184 (E. D. Pa., 1956). The plaintiff filed, "as part of an affidavit in support of its motion, a compilation of documents consisting of 945 pages, containing 504 exhibits" (pp. 189-190). The district court applied the unambiguous terms of a patent licensing agreement to the undisputed facts contained in that record and rendered summary judgment. That decision was affirmed by this Court in the *per curiam* opinion in *Krasnov v. United States*, 355 U. S. 5 (1957).

In the case at bar the district judge applied an unambiguous contract to undisputed facts set forth in the record and granted petitioner's motion for summary judgment. This Court passed on a comparable record in

Associated Press, et al. v. United States, 326 U. S. 1 (1945). In that case the district court applied by-laws of AP and a contract between AP and Canadian Press to certain facts which were undisputed and granted summary judgment. This Court affirmed that judgment as a proper application of Rule 56, even though there were conflicting contentions of the parties as to certain issues held by the district court to be immaterial to the disposition of the case. Two excerpts from this Court's opinion are most pertinent to the case at bar:

> "* * * For the court below found, and we think correctly, that the By-Laws on their face, and without regard to their effect, constitute restraint of trade. * * *" (p. 12.)

> "* * * In this case the government chose to present its case on the narrow issues which were within the realm of undisputed facts. * * *" (p. 22.)

The obligations of the reviewing court on appeal from a summary judgment are clearly demonstrated in this decision. This Court, in applying Rule 56, reviewed the record which was before the district court and, applying an unambiguous contract to undisputed facts, affirmed the motion for summary judgment granted by the district court. In the case at bar the court of appeals failed to perform the same function.

In *Powell v. U. S. Cartridge Co.*, 339 U. S. 497 (1950), this Court drew different inferences from those drawn by two separate courts below from undisputed facts in entering summary judgments. This decision conflicts with the holding of the court of appeals in the case at bar that a disagreement by the parties about inferences to be drawn from undisputed facts is a ground for denying summary judgment.

United States v. U. S. Gypsum Co., 340 U. S. 76 (1950), involved a summary judgment wherein this Court pointed out that the trial court was not required to consider evidence that would not affect the outcome. The same rule would apply in the case at bar, where, as set forth above, the district court held that the contract on its face precluded recovery even though there were conflicting contentions as to immaterial issues.

Admittedly there are certain circumstances which this Court has held necessarily place a case beyond the realm appropriate for summary judgment as delineated by the language of Rule 56. Antitrust cases in which motive and intent are critical elements embrace one such set of circumstances. As stated in *White Motor Co. v. United States*, ____ U. S. ____, 9 L. Ed. 2d 738 (1963), at page 744:

> "Summary judgments have a place in the antitrust field, as elsewhere, though as we warned in Poller v. Columbia Broadcasting System, Inc. 368 US 464, 473, 7 L ed 2d 458, 464, 82 S Ct 486, they are not appropriate 'where motive and intent play leading roles.' Some of the law in this area is so well developed that where, as here, the gist of the case turns on documentary evidence, the rule at times can be divined without a trial."

The case at bar is not an antitrust case where motive and intent play leading roles but a contract case, the gist of which turns on documentary evidence. The citation of the *White Motor* case by the court of appeals indicates a serious misinterpretation of that decision, opening the door for the imposition of any qualifications of Rule 56 deemed expedient. This misinterpretation urgently requires correction.

Another type of case in which this Court has declined to apply the summary judgment procedure is one where

many new contentions developed in this Court following the determination by the trial court. In *Kennedy v. Silas Mason Co.*, 334 U. S. 249 (1948), the Court in its opinion stated at page 256:

> "The short of the matter is that we have an extremely important question, probably affecting all cost-plus-fixed-fee war contractors and many of their employees immediately, and ultimately affecting by a vast sum the cost of fighting the war. No conclusion in such a case should prudently be rested on an indefinite factual foundation. The case, which counsel have described as a constantly expanding one, comes to us almost in the status in which it should come to a trial court. In addition to the welter of new contentions and statutory provisions we must pick our way among over a score of technical contracts, each amending some earlier one, without full background knowledge of the dealings of the parties. The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine.
>
> "We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. * * *"

The reasons for denying summary judgment in that case are thus succinctly defined. The posture of the case on appeal was different from that as submitted to the trial court. The case had been expanded by "a welter of new contentions and statutory provisions." The hearing and determination of contentions as to facts and the application of those facts to the document is a function of the trial

court. Where the trial court has performed these functions, as in the case at bar, summary judgment is proper. If on review that judgment is found to be supported by fact and law it should be affirmed.

Where the procedural problems outlined in the above quotation from the *Kennedy* case were not present, this Court later entered summary judgment in applying the same statute to the same contractual relationships in *Powell v. U. S. Cartridge Co.*, 339 U. S. 497 (1950), discussed *supra*.

3. The decision of the court of appeals is in conflict with decisions in other federal circuits.

One of the limitations placed on Rule 56 by the court of appeals in the case at bar is that the rule does not apply if the parties in good faith disagree about inferences to be drawn from the undisputed facts. Such a ruling is in direct conflict with the holding of the Court of Appeals for the District of Columbia in the case of *Fox v. Johnson & Wimsatt, Inc.*, 127 F. 2d 729 (1942). In delivering the opinion of the court of appeals Justice Rutledge said at pages 736-737:

> "* * * There was conflict concerning interpretation of the facts and the ultimate conclusion to be drawn from them respecting intention. But there was none as to the facts themselves. * * * Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court * * *."

The District of Columbia decision is completely sound and consistent with the express provisions of the rule, and that of the court of appeals in the instant case is contrary to it.

The court of appeals in the case at bar has cited the mere existence of reports, depositions, admissions and the like as showing that the case was too complex to review on summary judgment. The Second Circuit Court of Appeals, in the case of *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F. 2d 399 (1945), *cert. den.* 325 U. S. 861 (1945), does just the opposite in citing these things as a source of the facts justifying such a summary judgment. The court states at page 404 of its opinion as follows:

> "* * * The summary judgment procedure under Federal Rules of Civil Procedure, Rule 56, 28 U. S. C. A. following Section 723c, as we said in Engl v. Aetna Life Ins. Co., 2 Cir., 139 F. 2d 469, 472, 'is intended to permit "a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, and admissions on file show that there are no genuine issues of fact to be tried."' quoting 3 Moore's Federal Practice 3175 and citing authorities * * *."

In the case at bar the district court reviewed the record and found there is no dispute as to any material fact. Immaterial facts were culled out. The court of appeals did not review these findings to determine if the district court was right or wrong, and made no effort to distinguish between material and immaterial facts. The Fourth Circuit Court of Appeals has done just the opposite in the case of *McComb v. Southern Weighing & Inspection Bureau*, 170 F. 2d 526 (1948). In delivering the opinion of the court, Chief Judge Parker said at page 530:

> "Point is made that, whatever view be taken of the facts before the court, there was error in entering summary judgment instead of setting the case down for further hearing; but this point is entirely without

substance. The facts were fully developed by affidavit and there was no dispute as to any of them. In addition to the affidavits, depositions were taken, interrogatories were answered and the bureau was inspected by officials of the wage and hour division. The matters which the administrator suggests that he might be able to develop on further hearing, such as details of property owned by the bureau, the policing of grain door reclamation, protection of members from undercharges, or reasons of Dun & Bradstreet for their credit opinion, could in no way affect the conclusion to be drawn from the admitted facts. Everything that the administrator says that he hopes to show on further hearing may be admitted, and the result remains the same. Under such circumstances there is no reason why summary judgment should not be entered and the litigation ended. Federal Rules of Civil Procedure, Rule 56, 28 U. S. C. A."

Likewise, in the case of *James v. Honaker Drilling, Inc.*, 254 F. 2d 702 (1958), the Court of Appeals for the Tenth Circuit, in affirming the summary judgment, was only concerned with the facts upon which the outcome of the litigation depended. Chief Judge Bratton said at page 706:

"* * * But if it appears that there is no genuine issue as to any material fact **upon which the outcome of the litigation depends**, the cause is appropriate for disposition by summary judgment and the court should enter such judgment * * *." (Emphasis added.)

The conflict demonstrated by the comparisons of the above-cited representative decisions of other federal courts with the one to which this writ is directed calls for a pronouncement by this Court to declare the proper application of this important rule.

4. The decision of the court of appeals is erroneous.

Summary judgment for petitioner was rendered by the district court in this case only after careful and extended consideration of numerous materials before the court (R. 6c). However, the judgment was fully supported, and indeed compelled, even in the absence of other considerations, by the terms of a written contract between the parties which was conceded by respondent to be unambiguous (R. 47b). The following provisions of the contract, which are merely examples of many additional similar terms, display the justification for a summary judgment in favor of petitioner:

> "* * * The acceptance by the Contractor of final payment shall operate as a release to the Commission from all claims and liabilities of every type and nature owing to the Contractor in connection with the performance of the Contract * * *." (R. 47a-48a.)

> "The quantities listed in the Proposal Form are to be considered as approximate and are to be used only for the comparison of bids and as bases for computing amounts of security or penal sums of bonds to be furnished. The unit and lump-sum prices to be tendered by the Bidders are to be for the scheduled quantities as they may be increased or decreased. Payments, except for lump-sum contracts, and except for lump-sum items in unit-price contracts, will be made to the Contractor only for the actual quantities of work performed and materials furnished in accordance with the Plans and Specifications, and the scheduled quantities of work to be done and materials to be furnished may each be increased or diminished as hereinafter provided without in any way invalidating the unit and lump-sum prices set forth in the Proposal and embodied in the Contract." (R. 42a.)

"* * * Said borings, test excavations, and other subsurface investigations are not warranted to show the actual subsurface conditions * * *." (R. 43a.)

"* * * The Contractor agrees that he will make no claim against the Commission if the actual quantities do not conform to the estimated quantities." (R. 43a.)

"* * * The Engineer shall decide any and all questions which may arise as to the quality or acceptability of materials furnished and work performed, * * * whether or not such questions involve the interpretation of the Plans and Specifications. His decision on such questions shall be final * * *." (R. 3b.)

The efficacy of contract terms to support a judgment under these circumstances has been recognized by this Court as early as *Kihlberg v. United States*, 97 U. S. 398 (1878), in which Mr. Justice Harlan, delivering the opinion of the Court, said at page 402:

"* * * The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instrument."

The application of unambiguous contract terms to require a summary judgment is illustrated in *Simpson Brothers v. District of Columbia*, 179 F. 2d 430 (C. A. D. C., 1948), *cert. den.* 338 U. S. 911 (1950), in which Chief Judge Stephens delivered the opinion of the court, saying at page 434:

"* * * The escalator clause involved in the instant case is without ambiguity. The district court was therefore bound to apply it as written rather than according to some asserted interpretation."

CONCLUSION.

The summary judgment rule is basic to the rights of litigants and the administration of justice in the federal courts. A policy of extending a full trial to every litigant asserting a claim would be prohibitively expensive to the public, which bears the burden of furnishing trial tribunals, and to the unfortunate litigant opposing a non-meritorious claim, who must defray his own litigation expenses. In the federal courts, Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A., plays a key role in providing a policy of judicial administration which avoids such prohibitive consequences.

A summary judgment remedy is fundamental to the underlying philosophy of the Federal Rules of Civil Procedure, 28 U. S. C. A., as expressed in Rule 1 in these words:

> "These rules * * * shall be construed to secure the just, speedy, and inexpensive determination of every action * * *."

Unlike common law and code practices, current federal procedure establishes notice pleading in which the litigant is not required to assert in detail the basis of his claim or defense. Consequently, the common law or code demurrer is not an available means of prompt disposal of the claim or defense lacking basic merit in the federal practice. However, liberal discovery is available to permit the opposing litigant to ascertain the basis for the claim or defense. After discovery has pierced the notice of claim or defense to reveal its true nature, summary judgment procedure furnishes the means for weeding out the basically non-meritorious claim or defense without further expense and delay. Such a remedy is thus essential to an effective judicial procedure embracing notice pleading and liberal discovery.

Since this rule is of paramount importance, the unwarranted limitations imposed on it by the court of appeals which severely restrict its usefulness and obscure its meaning to the point of destroying it should not go unanswered. Such an attempt to usurp the power of this Court to amend the rules should not be permitted.

If the erroneous decision of the court of appeals is permitted to stand, it will create confusion as to the correct application of the summary judgment rule as displayed by the decisions of this Court and of some federal courts of appeal.

For the reasons enunciated, discussed and supported by authorities above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

MEMORANDUM OF THE UNITED STATES DISTRICT COURT RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

KLOEB, J.:

This matter comes before the Court on a motion of the defendant to enter judgment in its favor dismissing the action as to Counts 2 and 3 of the complaint (Count 4 now having been withdrawn by plaintiff), and establishing that defendant has no liability to plaintiff at this time under Count 1 of the complaint, and determining that plaintiff is liable to defendant upon the counterclaim on the grounds that there is no genuine issue as to any material fact, and that defendant is entitled to judgment as a matter of law, as appears from the pleadings, stipulation, depositions and deposition exhibits on file, and from the affidavits of Eugene W. Meeker, Francis K. Cole and John Soller, including the exhibits to the affidavits, filed in support of the motion.

The motion for summary judgment was filed March 20, 1961, and three affidavits and a brief accompanied the motion.

On June 19, plaintiff filed its brief in opposition to the motion and attached to the brief the affidavit of John A. Jenkins (Appendix A-1).

On August 1, defendant filed its reply brief and the motion was heard by the Court on the 4th day of October, 1961. A transcript of the hearing was filed with the Court on the 17th day of November, 1961.

From a study of the grounds of complaint, the contract, and the documents constituting a part of the contract, the stipulation, depositions and deposition exhibits, and the affidavits in support of the motion, and the affidavit in opposition thereto, including the exhibits to the

affidavits, the Court concludes that the motion ought to be and is sustained.

The contract on its face precludes plaintiff from recovery. Plaintiff appears to have foreclosed itself from recovery under Counts 2 and 3 of the complaint by the conditions in the contract to which it subscribed. In addition thereto, plaintiff accepted payment on twenty-four separate occasions on the terms offered and thereby compromised and settled its claims. It is, therefore, estopped by acceptance of these payments.

The contract is not ambiguous in any respect and plaintiff claims no ambiguity.

Plaintiff was one of many bidders for the three sections of the Turnpike proposed to be constructed and was successful in its unit price bid. To permit plaintiff to recover for the extras sought under Counts 2 and 3 would require the Court to reframe the contract or enact a wholly new one, diverging completely from the unit price basis and awarding to plaintiff sums more than double the unit price bid. This we feel we cannot do.

We conclude that defendant has no liability to plaintiff at this time under Count 1 of the complaint for failure or refusal of plaintiff to comply with the provisions of the contract.

In arriving at this decision, we do not determine that plaintiff is liable to defendant upon the counterclaim.

Judgment may be entered accordingly.

(signed) FRANK L. KLOEB,

United States District Judge.

Toledo, Ohio.

APPENDIX B.

OPINION OF THE COURT OF APPEALS.

(Decided April 3, 1963.)

Before: CECIL, Chief Judge, MILLER, Circuit Judge, and BOYD, District Judge.

Miller, Circuit Judge. This action arises out of a contract of December 31, 1953, between the plaintiff, a contractor, and the defendant, Ohio Turnpike Commission, for the construction by the plaintiff of approximately thirteen miles of the Ohio Turnpike in Williams County, Ohio.

The complaint, filed on June 4, 1957, alleges that the plaintiff duly completed all the work under the contract on its part to be performed, and under date of July 25, 1956, the Chief Engineer of the defendant certified to the defendant and to the plaintiff that the work of the contract was satisfactorily completed on June 8, 1956, in conformity with the plans and specifications of said contract.

The complaint seeks recovery of (1) $364,496.99 as the approved amount of compensation earned by the plaintiff, over and above all partial payments previously made, for the total amount of work performed by the plaintiff, which the complaint alleges the defendant admits that it owes but has refused to pay except on condition that it be accepted and operate as a full release of all claims of the plaintiff against the defendant, including the claims hereinafter referred to, (2) the sum of $1,140,941.54 for services and materials furnished at the direction and requirement of the defendant in a manner and to an extent other than contemplated and called for by the contract, resulting in a material departure from the plans and specifications and constituting a new and substantially different undertaking, and (3) damages in the amount

of $72,403.00, resulting from the rejection by defendant of concrete aggregates, consisting of stone and gravel, bought and furnished by the plaintiff in the performance of its contract, after the defendant's engineer had tested samples which were found to meet the specifications, and which aggregates were thereafter inspected, approved and accepted by defendant's engineers after being placed in a stockpile on the site of the work ready for use. These claims totaled $1,577,841.53, upon which 6% interest was claimed.

After the filing of an answer on October 17, 1957, depositions were taken by the plaintiff and defendant, plaintiff's request for admissions under Rule 36, Rules of Civil Procedure, was answered, and a stipulation with respect to certain facts and documents was filed. The defendant filed an amended answer on September 6, 1960. The answer, as amended, admitted the execution of the contract and many of the allegations of the complaint but took issue with the plaintiff on its construction of the contract, denied liability on the claims asserted by the plaintiff, and pleaded several defenses claimed under the provisions of the contract and the defenses of estoppel and accord and satisfaction. In this connection the amended answer asserted that the plaintiff had no right to rely upon the laboratory reports of the defendant made of the samples of concrete aggregates submitted by the plaintiff or the acceptance of the aggregates by defendant's engineer, and that said materials, as shown by a later laboratory report, did not meet the specifications of the contract.

On March 20, 1961, the defendant moved for summary judgment and filed three affidavits and its brief in support of the motion. On June 19, 1961, plaintiff filed its brief opposing the motion. The defendant filed a reply brief on August 1, 1961, and the plaintiff filed a supple-

mental memorandum in opposition to the motion on October 4, 1961. On November 24, 1961, plaintiff filed another supplemental memorandum in opposition to the motion, and the affidavits of Charles W. Billow, Jr., and Karl E. McLeister in support thereof. On December 5, 1961, the defendant moved to strike these affidavits from the file for the reason that they were not timely served or filed in accordance with Rule 56(e) of the Rules of Civil Procedure.

On March 30, 1962, the Court sustained defendant's motion to strike the two affidavits and also handed down a memorandum ruling that defendant's motion for summary judgment should be sustained. Judgment to that effect was entered on April 24, 1962, from which this appeal was taken.

This case has been thoroughly and extensively briefed and orally argued to the court on its merits by counsel for the respective parties. Irrespective of the merits of the case, appellant contends that by reason of the complexity of the issues involved, the scope and volume of the evidence, both documentary and otherwise, pertaining thereto, and the necessity for a full development of the facts for the purpose of clarifying the application of the law, this is not a case for disposition on motion for summary judgment. Appellee contends that regardless of the complexity of the issues and the scope and volume of the evidence, most of which is documentary, it was ultimately shown through the use of pretrial discovery proceedings that no genuine issue as to any material fact exists, that the question for decision is purely one of law for the Court, and that disposition of the case on motion for summary judgment was proper under Rule 56(c), Rules of Civil Procedure.

This Court has on several occasions expressed the view that a trial judge should be slow in disposing of a

case of any complexity on a motion for summary judgment, that while such a judgment wisely used is a praiseworthy and timesaving device, yet such prompt dispatch of judicial business is neither the sole nor the primary purpose for which courts have been established, and that a party should not be deprived of an adequate opportunity to fully develop his case by witnesses and a trial, when the issues involved make such procedure the appropriate one. *Knapp v. Kinsey*, 249 F. (2) 797, 801-803, C. A. 6th; *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F. (2) 425, 427 C. A. 6th; *Begnaud v. White*, 170 F. (2) 323, 327 C. A. 6th; *Estepp v. Norfolk & W. Ry. Co.*, 192 F. (2) 889, C. A. 6th; *Bellak v. United Home Life Ins. Co.*, 211 F. (2) 280, 283 C. A. 6th; *Hoy v. Progress Pattern Co.*, 217 F. (2) 701, 704 C. A. 6th. See: *Sartor v. Arkansas Gas Corp.*, 321 U. S. 620; *The White Motor Co. v. United States*, ____ U. S. ____ (Decided March 4, 1963).

It is often the case that although the basic facts are not in dispute, the parties in good faith may nevertheless disagree about the inferences to be drawn from these facts, what the intention of the parties was as shown by the facts, or whether an estoppel or a waiver of certain rights admitted to exist should be drawn from such facts. Under such circumstances the case is not one to be decided by the Trial Judge on a motion for summary judgment. *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, *supra*, 303 F. (2) 425, 427 C. A. 6th; *Begnaud v. White*, *supra*, 170 F. (2) 323, 327 C. A. 6th; *Cameron v. Vancouver Plywood Corp.*, 266 F. (2) 535, 539-540 C. A. 9th. *Girard v. Gill*, 261 F. (2) 695, 697 C. A. 4th; *Stevens v. Howard D. Johnson Co.*, 181 F. (2) 390, 394 C. A. 4th; *United States v. Kansas Gas & Electric Company*, 287 F. (2) 601 C. A. 10th; *Severson v. Fleck*, 251 F. (2) 920, 923 C. A. 8th; *Oil Trading Associates, Inc. v. Texas City Refin-*

ing Inc., 201 F. Supp. 846, S. D. N. Y. These principles are, in our opinion, applicable to the present case.

This case is not a simple one. It involves complex facts and issues. It was filed June 4, 1957. It has been strenuously contested. Motion for summary judgment was not made until March 20, 1961. The motion was not sustained until March 30, 1962. In the oral argument before this Court on the merits the maximum time allowance was used by both parties. It is stated in appellant's reply brief that appellant's appendix of 121 printed pages and appellee's appendix of 49 printed pages set forth affidavits and excerpts from more than 1800 pages of contract documents, plans, specifications, correspondence, reports, depositions, admissions and the like. More than the construction of the written contract is involved. The issues of defendant's breach of an implied warranty, estoppel, and accord and satisfaction must be considered in the light of the actions of the parties. It seems that a direct factual issue is presented by the defendant's contention that the concrete aggregates stockpiled by the plaintiff and rejected by the defendant did not meet the specifications of the contract. There are no findings of fact by the District Judge, since none are required or considered necessary by Rule 52(a), Rules of Civil Procedure, in summary judgment proceedings. Yet we find ourselves unable to satisfactorily review this judgment on the record before us without such findings.

We are of the opinion that this case is one where a full inquiry into the facts under usual trial procedure is advisable to develop the facts for the purpose of clarifying the application of the law, and that it is not a case suitable for disposition through summary judgment procedure. *Knapp v. Kinsey, supra*, 249 F. (2) 797, 802-803 C. A. 6th; *Bohn Aluminum & Brass Corp. v. Storm King*

Corp., supra, 303 F. (2) 425, 427 C. A. 6th; *Stevens v. Howard D. Johnson Co., supra*, 181 F. (2) 390, 394 C. A. 4th.

The judgment of the District Court is set aside and the case remanded to that court for further proceedings consistent with the views expressed herein.

APPENDIX C.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed April 3, 1963.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby set aside and the case remanded to that court for further proceedings consistent with the views expressed in the opinion.

Approved for entry:

s/ SHACKELFORD MILLER, JR.,

United States Circuit Judge.

APPENDIX D.

JUDGMENT OF THE UNITED STATES DISTRICT COURT.

This cause came on to be heard upon defendant's motion for summary judgment. The Court, being fully informed in the premises and having considered the pleadings, the contract (including all documents constituting a part of said contract), the stipulation of the parties, the admissions of the parties, the depositions and deposition exhibits, the affidavits in support of said motion, the affidavit in opposition to said motion, the exhibits to said affidavits, the briefs of counsel for both parties and the oral arguments of counsel for both parties, concludes and determines that:

(a) there is no genuine issue as to any material fact, and defendant is entitled to judgment as a matter of law, with respect to Counts II and III of the complaint and with respect to the liability of defendant to plaintiff at this time under Count I of the complaint;

(b) defendant's said motion is well taken as to Counts II, III and I of the complaint;

(c) the Court should not at this time decide defendant's said motion as to the counterclaim of defendant against plaintiff but should reserve that portion of said motion for future determination;

(d) there is no just reason for delay in the entry of final judgment as to Counts II and III of the complaint and as to the lack of any liability of defendant to plaintiff at this time under Count I of the complaint;

(e) plaintiff claims no ambiguity in the contract, and the contract is not ambiguous in any respect;

(f) the contract precludes plaintiff from recovery under Counts II and III of the complaint;

(g) plaintiff compromised and settled its claims under Counts II and III of the complaint by its acceptance of payment on twenty-four (24) separate occasions on the terms offered;

(h) plaintiff's acceptance of payments has estopped it from making the claims asserted in Counts II and III of the complaint; and

(i) plaintiff's failure or refusal to comply with the provisions of the contract precludes any liability of defendant to plaintiff at this time under Count I of the complaint.

It is, therefore, ORDERED, ADJUDGED, DECREED AND DIRECTED that:

(1) final judgment be, and it hereby is, entered and rendered for defendant against plaintiff upon Count II of the complaint;

(2) final judgment be, and it hereby is, entered and rendered for defendant against plaintiff upon Count III of the complaint;

(3) final judgment be, and it hereby is, entered and rendered for defendant against plaintiff as to any liability of defendant at this time under Count I of the complaint;

(4) defendant's motion for summary judgment as to its counterclaim against plaintiff be, and it hereby is, retained pending before the Court for further consideration and future decision; and

(5) the clerk be, and he hereby is, instructed to assess costs to date against plaintiff.

/s/ FRANK L. KLOEB,
United States District Judge.

Toledo, Ohio.

APPENDIX E.

28 U. S. C.

"§ 2072. *Rules of civil procedure for district courts*

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 103, 63 Stat. 104; July 18, 1949, c. 343, § 2, 63 Stat. 446; May 10, 1950, c. 174, § 2, 64 Stat. 158; July 7, 1958, Pub. L. 85-508, § 12(m), 72 Stat. 348."

APPENDIX F.

FEDERAL RULES OF CIVIL PROCEDURE, 28 U. S. C. A.

"Rule 56. *Summary Judgment*

"(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

"(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948.

"(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by

interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

"(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

"(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

"(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to

the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt."

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 247.

OHIO TURNPIKE COMMISSION,

Petitioner,

vs.

S. J. GROVES & SONS COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER.

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Court Rules.

Rule 56, Federal Rules of Civil Procedure, 28 U. S. C. A. 1, 3, 4

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REPLY BRIEF OF PETITIONER.

In its brief respondent seeks to divert this Court's attention away from the fact that the court of appeals **did not review the record** and determine that there were issues of material fact requiring trial but instead **accepted** respondent's **contentions** that such issues exist. The factors which are controlling and decisive under Rule 56 were not determined.

The failure to review the record is acknowledged by the express language of the opinion. In that opinion the court of appeals stated that it was unable to satisfactorily review the record. It is thus obvious that it did not do so.

> "* * * There are no findings of fact by the District Judge, since none are required or considered necessary by Rule 52(a), Rules of Civil Procedure, in summary judgment proceedings. Yet we find ourselves unable to satisfactorily review this judgment on the record before us without such findings." Petition, Appendix B, p. 31.

In lieu of reviewing the record the court of appeals based its decision on contentions advanced by the parties: "* * * **It seems that a direct factual issue is presented by** the defendant's **contention** * * *." (Emphasis added; Petition, Appendix B, p. 31.)

By construing the phrase "it seems" as being synonymous with "we find," and by deleting from the quotation the words "by the defendant's contention," respondent arrives at the distorted conclusion, and boldly asserts, that the court of appeals found a direct factual issue in the record before it: "The basis of the decision of the court of appeals is simply that the record before it did not show the absence of a dispute as to any material fact. The court found a 'direct factual issue' regarding the acceptability of certain concrete aggregates. * * *" (Respondent's Brief, p. 5.)

That the court of appeals did not base its decision on the record becomes abundantly clear when the opinion is read in its entirety. The district court had studied that record and tested the contentions of respondent against it. Based on that review Judge Kloeb determined that there was no issue as to any fact material to the following disposition by the court of respondent's contentions: the contract documents, including the plans and specifications, did not misrepresent the work to be performed; the plans were not insufficient; the alleged implied warranties were expressly denied by the provisions of an unambiguous contract. He ruled that the testimony of engineers for the purpose of varying the terms of the contract was immaterial and thus would not be admissible. He found undisputed proof of the defenses of estoppel and accord and satisfaction in the record documents before him. Judge Kloeb determined that on each of several grounds petitioner was entitled to judgment as a matter of law.

Nowhere in its opinion does the court of appeals provide a basis for holding that the district court erred in any one of these rulings. Nowhere in that opinion does it say that the record supports respondent's contentions that there are issues of material fact or that the district court erred in its legal conclusions which were based on that record. A reading of the entire opinion leads to the inescapable conclusion that the court of appeals did not review the record before it. It did not make a determination, as required by Rule 56, that there was a genuine issue of material fact requiring trial or that petitioner was not entitled to judgment as a matter of law. Instead, the court proceeded to engraft the new and unauthorized amendments to the rule discussed in our petition and in so doing provided for itself an escape route which justified its failure to review the record. The court of appeals obviously believed that it was not obligated to apply the tests of Rule 56 if the record appeared to be voluminous, the documents comprising the contract many, or the case otherwise "complex."

As by-products of such a course of action, unsubstantiated contentions overcome undisputed facts; the studied decision of the district court is summarily reversed without a finding of error on his part; and the effective use of Rule 56 by litigants and the courts is eliminated.

Respondent's statement that petitioner seeks judgment regardless of what the facts may be and irrespective of whether the record may have shown disputes of fact (Respondent's Brief, p. 7) is both incorrect and unwarranted. It is petitioner's position, and the district court after study of the record found, that there was no dispute as to any fact material to the determination of the case. The work performed was undisputed (Respondent's Brief, p. 3). The contract documents are of record. Depositions

and affidavits were used to force respondent to make its claims specific. There are no issues of material fact requiring trial. It is because of the facts, not in spite of them, that petitioner is entitled to judgment.

Kennedy v. Silas Mason Co., 334 U. S. 249 (1948), claimed by respondent to be controlling, supports petitioner's position. Judge Kloeb performed the exact functions prescribed for a district court in that case. The record and the issues on appeal remain unchanged. That decision is not authority for the proposition that without reviewing the record an appellate court may accept contentions of the losing party as true and reverse the decision of a district court.

None of the cases cited by respondent is authority for the alteration or disregard of the requirements of Rule 56, thus in effect amending the rule. The decision of the district court is squarely supported by *McArthur Bros. v. United States*, 258 U. S. 6 (1922), and *Kihlberg v. United States*, 97 U. S. 398 (1878).

The confusion and damage which will result from this decision if it is allowed to stand may be illustrated by reference to the series of judicial events which led up to this Court's 1963 amendment to Rule 56(e). While that amendment is not applicable to this case, it is, however, declaratory of pre-existing law as to the duty of both trial and reviewing courts to look behind the contentions of the parties and determine from the record proof before them whether summary judgment can be properly granted. The Advisory Committee so indicates in its 1963 note to (e), which includes this comment:

> "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. * * *"

If the decision of the court of appeals is permitted to stand, Rule 56 will be emasculated and confusion as to its proper application will permeate the federal judiciary and bar. This case affords an opportunity to this Court to stifle at its inception an impairment to the administration of justice. Therefore the petition for certiorari should be granted.

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In the

Supreme Court of the United States

October Term, 1963

OHIO TURNPIKE COMMISSION,
Petitioner,

v.

S. J. GROVES & SONS COMPANY,
Respondent.

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Respondent.

BRIEF OF RESPONDENT

OPINIONS BELOW

The section entitled "Opinions Below" in the petition is correct.

JURISDICTION

We agree with the petitioner's jurisdictional statement.

QUESTIONS PRESENTED

The questions before the court of appeals were (1) whether the pleadings, depositions, admissions and affidavits on file showed that there was no genuine dispute as to any material fact and (2) if there was no dispute,

whether the petitioner was entitled to judgment as a matter of law. (Rule 56(c), Federal Rules of Civil Procedure).

The court of appeals answered the first question in the negative on the basis of its findings of disputes of fact, stating:

> "This case . . . involves complex facts and issues. . . . It has been strenuously contested. . . . More than the construction of the written contract is involved. The issues of defendant's breach of an implied warranty, estoppel, and accord and satisfaction must be considered in the light of the actions of the parties. *It seems that a direct factual issue is presented* . . ." (Emphasis added) (Petitioner's Appendix, p. 31).

Accordingly, the case was remanded to the district court for a full development of the facts under the usual trial procedure.

The question presented by the petition is whether the decision of the court of appeals is in conflict with the applicable decisions of this Court or of another court of appeals, or has so far departed from the accepted and usual course of proceedings in summary judgment cases as to call for an exercise of this Court's power of supervision. (Rule 19.1 (b), Revised Rules of the Supreme Court of the United States).

STATUTE AND RULE INVOLVED

The petitioner has correctly identified the statute and rule involved herein.

STATEMENT

A succinct statement of all that is material to the consideration of the questions presented appears in the opinion of the court of appeals (Petitioner's Appendix, pp. 27-29)

and will not be repeated here. We do consider it necessary, however, to point out several inaccuracies in the petitioner's statement of the case.

This case is not, as petitioner erroneously contends, (Petition, pp. 4, 5) a simple exercise in applying the terms of an unambiguous contract to an agreed set of facts. It involves complex facts and issues, many of which remain strenuously disputed and contested even after extensive discovery proceedings, as the court of appeals correctly determined. (Petitioner's Appendix, p. 31).

The principal question on the merits is whether the petitioner breached the contract by providing plans and specifications which misrepresented the work to be performed and which were insufficient to accomplish the purpose in view. The determination of this question involves a comparison of the nature and scope of the project upon which the minds of the parties met (as set forth in a multitude of technical contract documents) with the nature and scope of the work the contractor was actually required to perform. If the difference between the two is so great as to amount to a breach of contract, the contractor is entitled to recover his damages. *Hollerbach* v. *United States*, 233 U.S. 165 (1914); *Montrose Contracting Co.* v. *County of Westchester*, 80 F. 2d 841 (2 Cir. 1936), cert. den. 298 U.S. 662; *Salt Lake City* v. *Smith*, 104 Fed. 457 (8 Cir. 1900).

There is little disagreement between the parties as to the work the respondent actually performed; but there is considerable dispute as to the work contemplated, notwithstanding petitioner's incorrect statement that "the written contract of the parties contemplated the very conditions which were encountered." (Petition, p. 5). Resolution of this dispute requires an examination of the many technical contract plans and specifications through the eyes of the engineers who prepared them and the engineers who

used them in preparing the bid. The substance of respondent's position that it performed work far different from that called for by the contract is demonstrated by many facts appearing in the record in hundreds of exhibits, admissions of fact, and in affidavits contained in appellant's printed Appendix in the United States Court of Appeals for the Sixth Circuit.

Another factual dispute apparent on the face of the record and noted by the court of appeals (Petitioner's Appendix, p. 31) is whether the concrete aggregates stockpiled by the respondent and rejected by the petitioner met the specifications of the contract.

Faced with a record containing affidavits and excerpts from more than 1800 pages of contract documents, plans, specifications, correspondence, reports, depositions and the like, in a case involving not only the construction of a written contract but also the issues of breach of implied warranty, estoppel, and accord and satisfaction, and convinced that there remain to be resolved several substantial disputes of fact, the court of appeals concluded:

> "We are of the opinion that this case is one where a full inquiry into the facts under usual trial procedure is advisable to develop the facts for the purpose of clarifying the application of the law, and that it is not a case suitable for disposition through summary judgment procedure. *Knapp* v. *Kinsey*, *supra*, 249 F. (2) 797, 802-803 C.A. 6th; *Bohn Aluminum & Brass Corp.* v. *Storm King Corp.*, *supra*, 303 F. (2) 425, 427 C.A. 6th; *Stevens* v. *Howard D. Johnson Co.*, *supra*, 181 F. (2) 390, 394 C.A. 4th. (Petitioner's Appendix, p. 31)

REASONS FOR DISALLOWANCE OF THE WRIT

The question presented by the petition was decided by this Court in the case of *Kennedy* v. *Silas Mason Co.*, 334

U.S. 249 (1948), wherein Mr. Justice Jackson stated (p. 256):

> "The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine."

See also, *United States* v. *Diebold*, 369 U.S. 654 (1962); *Poller* v. *Columbia Broadcasting System, et al.*, 368 U.S. 464 (1962); *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944).

The decision of the court of appeals was controlled by and is entirely consistent with the above decisions of this Court. No new law can be made by allowing the writ in this case.

1. The decision of the court of appeals does not amend Rule 56 of the Federal Rules of Civil Procedure.

The petitioner argues that, in reversing the summary judgment granted by the district court, the court of appeals engrafted certain amendments onto Rule 56 and in so doing usurped the rule-making power of the Supreme Court. This is patently untrue.

The basis of the decision of the court of appeals is simply that the record before it did not show the absence of a dispute as to any material fact. The court found a "direct factual issue" regarding the acceptability of certain concrete aggregates. The court was also of the opinion that further factual development regarding the actions of the parties was necessary to a determination of the issues of breach of implied warranty, estoppel and accord and satisfaction. (Petitioner's Appendix, p. 31) Since the record

did not satisfy the first requirement of Rule 56 (c) (that there be no genuine issue as to any material fact) it was not necessary for the court to consider the second requirement (that the moving party be entitled to a judgment as a matter of law).

Thus, far from adding any *amendments* to Rule 56, the court of appeals did not even have to apply all requirements of the rule as written in order to reach its decision. Petitioner's contention to the contrary is without merit.

2. The decision of the court of appeals is consistent with prior determinations of this Court.

We have previously cited the cases of *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249 (1948); *United States* v. *Diebold*, 369 U.S. 654 (1962); *Poller* v. *Columbia Broadcasting System, et al.*, 368 U.S. 464 (1962); and *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944), as decisions of this Court which are controlling in this case. These decisions hold in substance that summary judgment should be granted only when the moving party is entitled to judgment as a matter of law, the truth is quite clear, the issues "clear-cut and simple" and no genuine issue remains for trial. In cases involving complex facts and issues, where conflicting inferences may be drawn from the underlying facts, or where some of the facts remain in dispute, summary judgment is improper. The court of appeals' decision in this case is directly in line with the above decisions. There is no conflict.

In view of the foregoing, we do not consider it necessary or proper here to undertake a case-by-case analysis of the decisions of this Court which petitioner contends are in conflict with the decision of the court of appeals. It is sufficient to say that in each of said cases the only questions involved were of law, not of fact, and therefore summary judgment was properly entered.

3. The decision of the court of appeals is not in conflict with decisions in other federal circuits.

The distinction between the instant case and the case of *Fox* v. *Johnson & Wimsatt, Inc.*, 127 F. 2d 729 (D.C. 1942), relied upon by the petitioner, appears from the portion of the opinion immediately following that quoted by petitioner (at p. 737):

> "The Court had before it all the facts which formal trial would have produced. Going through the motions of trial would have been futile. Judgment therefore was given properly for the defendant."

In the instant case, by contrast, the court of appeals found that a trial is necessary to permit a further development of the facts and to resolve disputed facts. In *United States* v. *Diebold*, 369 U.S. 654 (1962), this Court reversed a summary judgment to resolve conflicting inferences from underlying facts, a situation much like this case.

The other cases cited by petitioner are distinguishable on similar grounds. In each case the court of appeals was satisfied that the test of Rule 56 had been met, namely that the record showed there was no dispute as to any material fact.

4. The decision of the court of appeals is correct.

The petitioner's final contention appears to be that the contract on its face precludes the respondent from any recovery *regardless of what the facts may be* and, therefore, that the summary judgment should have been affirmed *even though the record may have shown disputes of fact*. This contention merits only the briefest response.

Under the substantive law applicable to this case, contract clauses of the type quoted by the petitioner will not bar recovery if the respondent succeeds in proving the

alleged breach of contract. *United States* v. *Spearin*, 248 U.S. 132, 136 (1918); *Salt Lake City* v. *Smith*, 104 Fed. 457 (8 Cir. 1900); *Nix, Inc.* v. *City of Columbus*, 111 Ohio App. 133, 171 N.E. 2d 197 (1959); *Pitt Construction Co.* v. *City of Dayton*, 237 Fed. 305 (6 Cir. 1916).

In *United States* v. *Atlantic Dredging Co., et al*, 253 U.S. 1 (1920), this Court cited several prior decisions stating the rule that contractors ought to be relieved from clauses requiring them to visit the site and inform themselves of the actual conditions when they are misled by erroneous statements in the specifications and applied the rule to facts similar to those of the instant case. Therefore, the decision of the court of appeals on this point is not erroneous.

A complete presentation of the facts is all important to the determination of this litigation. Since there are disputed facts, the court of appeals quite properly remanded the case for a trial in the usual manner.

CONCLUSION

The court of appeals correctly held that the summary judgment entered by the district court in favor of the petitioner was erroneous. Because of the complexity of the facts and issues involved, the existence of disputed questions of fact and the need for additional evidence and fact findings, this is clearly not a case suitable for disposition through summary judgment procedure.

The petitioner has failed to show "special and important reasons" for the allowance of its petition, or that the case is of interest to the public, as distinguished from the particular parties here involved. Therefore, the petition should be denied.

Respectfully submitted,

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